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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES MARTIN JENSEN, Defendant and Appellant.	A131610 (Contra Costa County Super. Ct. No. 5-090319-5)

A jury convicted defendant, a daycare provider, of molesting two children under his supervision on 14 separate occasions. The trial court, following the stringent requirements of California's "One Strike" law, sentenced defendant to 120 years to life and imposed several fines. Defendant appeals, seeking reversal of his conviction or, in the alternative, reduction of his punishment. We vacate the $176 probation fee report but otherwise affirm.

FACTUAL BACKGROUND

Defendant and his wife ran a small daycare program from their home in Martinez, California. Jane Does 1 and 2 attended the daycare program.

In December 2008, Jane Doe 1's mother observed Jane Doe 1, then eight years old, using a showerhead on her vagina. When questioned, Jane Doe 1 said defendant had touched her private parts and bottom. Jane Doe 1's mother went to the police, the police contacted defendant, and, during a three-hour interview, defendant confessed to

inappropriately touching Jane Doe 1 and also Jane Doe 2, who was 10 years old at the time, on multiple occasions.

On November 10, 2010, the Contra Costa County District Attorney filed a first amended information charging defendant with 14 counts of lewd acts upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a).[1] Counts 1 through 5 correlated with five alleged incidents between September 2007 and December 2008 involving Jane Doe 1; the other nine counts concerned Jane Doe 2. Defendant pleaded not guilty and moved to suppress his confession, a request the trial court denied.

Trial commenced on November 17, 2010. Both Jane Does testified. Jane Doe 1, in particular, said defendant touched her more than 20 times between September 2007 and December 2008. Each time she had her clothes off. And each time defendant touched her "chest," "private part" for "going to the bathroom," and "bottom part" for "sitting on a chair." In addition, a detective presented a videotape of the police interview during which defendant confessed.

Defendant called an expert in child psychiatry who explained how children can misremember incidents of alleged sexual assault. Defendant also called a nurse who measured his blood-sugar level at 243 upon intake at the Martinez jail, shortly after he confessed. High blood sugar might cause tiredness and lack of focus. While defendant's number was elevated, it was "not critically high," and defendant made no complaint to the intake nurse who wrote he was alert.

On December 16, 2010, a jury convicted defendant of all 14 counts. On March 18, 2011, the trial court sentenced defendant to an aggregate prison term of 120 years to life and imposed a number of monetary fines, including a $176 probation report fee. Defendant filed a timely notice of appeal.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

DISCUSSION

Defendant contends his conviction should be reversed because (1) the trial court assertedly allowed the prosecutor to strike a juror based on racial bias, (2) sealed records should have been disclosed to defendant before trial, (3) defendant's confession was involuntary and should have been excluded, (4) an expert should have been allowed to testify about the types of physical injuries molest victims suffer, (5) counts 1 through 5 (concerning touchings of Jane Doe 1) were not supported by sufficient evidence, and (6) CALCRIM No. 330 violated defendant's constitutional rights and should not have been given. Defendant also argues his 120-year-to-life sentence is cruel and unusual punishment and disputes the imposition of a $176 probation report fee.

Batson/Wheeler *Challenge*

During jury selection, the court asked Juror No. 41, M.N., whether any of "the questions that I have asked and the attorney[s] have asked, cause you any concern about your ability to be fair to either side?" M.N. volunteered: "[N]o issues about being fair or not. The only thing I can think of is the one issue you brought up, which was single eye witness testimony with no evidence. I was thinking about that. It might cause me to, you know, be a little hesitant or maybe hold that witness to a very high standard of credibility. But, you know, I haven't had that situation before, so I can't be sure. But that's the only one that caused me a little bit of pause."

Later, when defense counsel prompted M.N. to comment about the rules and issues that had been raised during voir dire, M.N. stated: "I have to admit, the only concern I have is, you know, it's a very serious allegation and, you know, if you only have one critical piece of evidence then you have to, you know, make sure I give that a lot of weight." Following up, defense counsel asked: if the court instructs you "in considering the testimony of a single witness you're supposed to evaluate that based on all the other evidence . . . does that make you more comfortable with that idea?" M.N. responded: "I would assume I would be doing that anyway."

The prosecutor also questioned M.N., about the single witness issue. "Do you think you could follow the law in that regard?," he asked. "I think I can," M.N. replied. "Like I said, because the seriousness of the allegation, I would just make sure I was extremely diligent and, you know, and evaluate their testimony." The prosecutor continued, asking if all you had was a child's testimony, "would you be able to base a verdict on that testimony, if you believe it, would you be able to do it? You're hesitating." M.N. then answered: "Yeah. You know, I have never had to do it, right, so I have never sat on jury duty, so like I say, it gives me pause. But if it was convincing and, you know, beyond a reasonable doubt, then I would have to, you know, I would have to obey the law and my instructions." After further probing, M.N. concluded: "I think I can. That's the best answer I can give you."

Following these conversations, the prosecutor exercised a preemptory challenge against M.N., who had identified himself as an African-American. Defendant objected under *Batson* and *Wheeler*,[2] contending the prosecutor's decision emanated solely from racial bias.

The process for resolving a *Batson*/*Wheeler* objection is well established. " 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*) ["Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all . . .' . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Watson*) ["the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution"].

tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 559.)

In this case, the trial court erroneously skipped to the second step, stating "[t]here's no longer a requirement for prima facie case, so I'll ask the People for a response" to the accusation of racial bias. The prosecutor then offered his justification for striking M.N.

M.N., he said, struggled with the idea of finding guilt based on the testimony of a single witness. The prosecutor feared jurors with such concerns given the role victim testimony would play in the case. He said, acknowledging the defendant's confession would come in, "I doubt [defendant's lawyer] is going to stand up and say my client is guilty of everything. In order for there to be a defense, that defense has to be based on a victim of a sexual assault not telling the truth. And somebody that has issues with a single witness . . . causes a problem in this type of case, and the Court's aware one witness did not disclose, then disclosed. [¶] . . . So it always—ultimately going to come down to whether or not they believe the victims and whether a single witness is sufficient for them to render a verdict." The prosecutor mentioned a case he had recently tried in which a juror concerned about convictions based on a single witness hung a jury. The prosecutor further stated many of his challenges had been "on people who have hesitated or expressed reservations on" the single witness principle. He had similar concerns about another juror still sitting on the panel, Juror No. 8, but believed Juror No. 8's statements were less troubling. Finally, the prosecutor noted he had let M.N. stay on the jury despite several earlier opportunities to easily dismiss him.

Defendant argued M.N. did not categorically say he could not convict based on one witness. Defendant also argued the case was not a one-witness case, because "[defendant's] confession is coming in." Before the trial court, defendant did not offer a

"comparative juror analysis"—that is, defendant did not compare M.N.'s answer on the single witness issue to the answers of jurors the prosecution kept.

The trial court overruled defendant's objection and allowed M.N. to be excused. It concluded the prosecutor's "one witness" concern was "a natural response" given the expected shape of the case, "valid," and "race neutral."

Because the prosecutor gave reasons for the peremptory challenge of Juror M.N., and the trial court ruled on the ultimate question of intentional discrimination, we, on appeal, skip the issue of whether defendant made a prima facie case (which the trial court never addressed, and which is now moot), and "proceed directly to the third step of the *Batson*/*Wheeler* analysis."[3] (*People v. Elliott*, *supra*, 53 Cal.4th at pp. 560–561.)

"At the third stage of the *Wheeler*/*Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. omitted (*Lenix*).)

"Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's

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[3] Defendant suggests we must reverse the trial court's decision solely because the trial court assumed defendant had made his prima facie case and did not solicit argument from defendant on this threshold issue. The trial court did not, however, prejudice defendant by *relieving* him of his step-one burden to make a prima facie case. As recounted above, the trial court heard and considered defendant's arguments in support of the *Batson*/*Wheeler* challenge and did not limit his presentation.

justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' " (*Lenix*, *supra*, 44 Cal.4th at pp. 613–614.)

Defendant contends the prosecutor's reasons for rejecting M.N. were false and the trial court had no evidentiary basis to accept them. According to defendant, this was not a "single witness" case because of defendant's confession. Moreover, defendant asserts M.N.'s take on the single witness issue was not "prohibitive[ly] uncertain[]." First, whether or not defendant's disclaimed confession renders this case a "single witness" case or not is a matter of semantics. The questioning of the court, defense counsel, and prosecutor on the single witness issue, however, reflected a legitimate concern about how jurors would treat victims' testimony about their un-witnessed crimes. Defense counsel himself told the trial court: "I guess what [the prosecutor] is saying is that he uses the single witness question as a proxy for the kind of juror he would want in a case like this." We find nothing untoward about this.

As to M.N.'s level of uncertainty, there is no question he was uncertain and hesitant, if thoughtful. In comparison, other jurors unequivocally said they could convict a defendant based on the testimony of one witness. Uncertainty on the single witness issue is a race-neutral criteria, and no authority suggests M.N. had to somehow be "more uncertain" before the prosecutor could strike him.

Here on appeal, defendant claims the prosecutor did not dismiss three non-African-American jurors with similar positions on the single witness issue, Juror Nos. 3, 20, and 94. Defendant claims this so-called comparative juror analysis shows the prosecutor acted from racial bias. A comparative juror analysis can provide "circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of

intentional discrimination." (*Lenix, supra,* 44 Cal.4th at p. 622.) Even though "[d]efendant did not raise this issue at trial," and "[d]espite problems inherent in conducting comparative juror analysis for the first time on appeal—including the difficulties of comparing what might be superficial similarities among prospective jurors and trying to determine why the prosecutor challenged one prospective juror and not another when no explanation was asked for or provided at trial—both the high court and this court have done so on request." (*People v. Jones* (2011) 51 Cal.4th 346, 364.) But a defendant "who wait[s] until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Lenix, supra,* 44 Cal.4th at p. 624.)

Comparing M.N. to Juror Nos. 3, 20, and 94 is of no help to defendant here. To the contrary, the comparison completely undermines his position. Defendant, in his brief, states "the prosecutor had no difficulty with . . . prospective jurors" 3, 20, and 94. This is not a fair characterization of the record. Not one of these prospective jurors was on the final panel. The prosecutor dismissed Juror No. 3, M.J. The court dismissed Juror No. 20, D.D., who said he "would really struggle with" the single witness issue, and Juror No. 94, A.E., who said she "maybe . . . want[ed] something more" than a single witness's testimony.[4]

Finally, the timing and circumstance of a peremptory challenge is a valid factor to analyze in determining whether the reasons given by the prosecutor were pretextual. (See *Batson, supra,* 476 U.S. at p. 94; cf. *Lenix, supra*, 44 Cal.4th at p. 629 ["the prosecutor had accepted the panel when it contained L.F."]; *Lenix*, at p. 629 [" prosecutor's

[4] Neither defense counsel nor the attorney general called these critical facts to our attention. It is particularly unsettling that defense counsel called out a fourth prospective juror for a potential comparison with M.N., but declined to make the comparison because *that* juror "was peremptorily challenged by the prosecutor." Defense counsel thus impliedly vouched the other three jurors actually served on the final jury. We now know they did not.

acceptance of the panel containing a Black juror strongly suggests that race was not a motive"].) Here, it is undisputed the prosecutor "passed" up earlier chances to strike M.N. from the jury panel, and even had a chance to stipulate to his dismissal due to an irregularity with the trial court's attendance taking. This further suggests the prosecutor's benign motives.

Considering the entire record, the trial court here had substantial evidence from which it could conclude the prosecutor's reasons for striking M.N. were "valid," and its "sincere and reasoned" evaluation of the prosecutor's credibility is "entitled to deference on appeal." (*Lenix*, *supra*, 44 Cal.4th at pp. 613–614.)

Sealed Records of Victim's Counselor

" ' "[T]he right of an accused to obtain discovery is not absolute." [Citation.] "[The] court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest." ' " (*People v. Avila* (2006) 38 Cal.4th 491, 606.) For instance, a patient or psychotherapist has a privilege to refuse to disclose, and to prohibit another from disclosing, confidential psychotherapist-patient communications. (Evid. Code, § 1014.) In balancing a defendant's Sixth Amendment right of confrontation and a victim's right of privacy, privileged psychotherapist records will remain private unless "necessary to ensure defendants' constitutional right[] . . . of confrontation." (*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1295.) The trial court may review sought-after psychotherapist records in camera to determine whether any should be disclosed. Defendants who challenge a trial court's refusal to disclose records on appeal " ' "must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record." ' " (*People v. Avila*, *supra*, at p. 606.)

Defendant subpoenaed one victim's school counseling records. The school objected to disclosure. The trial court then, with a list of items to look for from defendant, reviewed the "10 to 12 pages" of records in camera. It found "nothing even

remotely like anything that defense asked me to look for" and, balancing defendant's interest in due process and the victim's interest in privacy, concluded nothing should be disclosed.

Defendant and the Attorney General agree our task is to review the confidential materials and review the trial court's discovery ruling for an abuse of discretion. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.) We have obtained and reviewed the confidential material, 15 pages in total.[5] We see nothing favorable to the accused and material to the issue of guilt, nor anything necessary for effective cross-examination of the victim. The trial court's denial of discovery, therefore, was not an abuse of discretion.

Confession

"A criminal conviction may not be founded upon an involuntary confession. (*Lego v. Twomey* (1972) 404 U.S. 477, 483 . . . .) The prosecution has the burden of establishing voluntariness by a preponderance of the evidence. Whether a confession was voluntary depends upon the totality of the circumstances. We accept a trial court's factual findings, provided they are supported by substantial evidence, but we independently review the ultimate legal question." (*People v. Scott* (2011) 52 Cal.4th 452, 480.)

" 'A confession is involuntary if it is "not ' "the product of a rational intellect and a free will" ' " [citation], such that the defendant's "will was overborne at the time he confessed." [Citation.] In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable."

[5] The counseling records were not in the record on appeal and we obtained them without assistance from defendant. We thus could alternatively deny defendant relief on this issue based on his failure to make his record and to carry his burden on appeal. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141; *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 654.)

[Citation.] Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation.' [Citation.] ' "The question posed . . . in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.]' (*People v. Thompson* (1990) 50 Cal.3d 134, 166 . . . .)" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1212.)

During a three-hour interview with police officers on December 19, 2008, defendant confessed to touching Jane Does 1 and 2 and described his interactions with them in detail. Defendant maintains his admissions were involuntary, citing a handful of statements made by the officers during the course of the interview. On November 16, 2010, defendant moved to exclude his admission from evidence at trial. The trial court denied the motion from the bench, not seeing "anything wrong" with the officers' interview of defendant.

On appeal, defendant first complains the officers suggested he would receive treatment, not punishment, if he confessed. (*People v. Carrington* (2009) 47 Cal.4th 145, 170 [" ' "police must avoid false promises of leniency" ' "].) They told him "a lot of people who do thing towards kids . . . [i]t's something that, maybe is wrong up here [indicating to head] . . . . [¶] There's help for that. [¶] [I]t's really not a criminal thing . . . it's an imbalance in their brain." One officer later said, "[n]obody's saying you're a criminal . . . [i]n fact we know you're not one," noting his lack of a prior criminal record.

While the officers could not falsely promise defendant leniency, the officers could express a sympathetic personal view of defendants' crimes, real or feigned, to encourage a confession without rendering it involuntary. (See *People v. Holloway* (2004) 33 Cal.4th 96, 116 [officer's suggestion that killings might have been accidental or the product of drunken rage did not invalidate confession]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1043 [officer's efforts to establish a rapport with the defendant do not constitute coercion]; *People v. Vance*, *supra*, 188 Cal.App.4th at p. 1212 [no "implied promise of

leniency" in "statement that '[w]e are here to listen and then to help you out' "]; *Miller v. Fenton* (3d Cir. 1986) 796 F.2d 598, 612 [officer's friendly manner, remark that he personally believed that the defendant was not a criminal, and offer of psychiatric help did not impair voluntariness of confession].) The officers' sympathetic statements here "fall far short of being promises of lenient treatment in exchange for cooperation. [They] did not represent that they, the prosecutor or the court would grant defendant any particular benefit . . . ." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 116.)

Defendant's reliance on *People v. Hogan* (1982) 31 Cal.3d 815 (*Hogan*), disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836, is misplaced. First, *Hogan* is factually distinguishable. It involved false statements that made the defendant doubt his own sanity, thus making an offer for mental help in that situation an impermissible offer of leniency. (*Hogan*, *supra,* at pp. 836, 840–841 [defendant legitimately believed " 'if I pleaded like I'm nuts they'd get me off' "].) There is no suggestion defendant here began to doubt his own sanity. Unlike in *Hogan*, the officers' references to help related to defendant's motivation for sexual contact with children, not to any cognitive inability on defendant's part to understand his situation and act voluntarily. Further, defendant stated several times during the interview he knew he was going to jail. Not only is *Hogan* distinguishable, the opinion, in any event, represented the view of only two Justices, Chief Justice Bird and Justice Broussard, and does not bind us. (*Id.* at pp. 816, 820, 855.) Two concurring justices did "not believe that the offers of police help for Hogan's psychiatric problems amounted to an implied promise of leniency" (*id.* at p. 855 (conc. opn. of Kaus, J.) and two dissenting justices concluded "no specific offers of help or treatment were discussed" and "defendant's confession of guilt was not a product of [an] . . . offer of help" (*id.* at p. 860).

Defendant's second complaint is that the officers demanded further information because he was "leadin[g] [them] to believe that more happened than what we know," asked for more specifics by stating "we don't want the court . . . to interpret this," and

implored defendant to disclose more so to not further burden the child victims. Such exhortations are not problematic. (See, e.g., *People v. Carrington*, *supra*, 47 Cal.4th at p. 174 [" ' "[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." ' "]; *People v. Vance*, *supra*, 188 Cal.App.4th at p. 1212 [finding no problem in "statement that 'the court . . . wants to know what the real story is' "].)

Defendant next urges the officers lied about having DNA evidence and told defendant things would go worse for him if he did not explain it. Looking at the portions of the interview defendant cites, the officers made the following statements concerning DNA: "You understand how DNA works and stuff?" "What do you think the results will show[?]" "Tell me why DNA would be found on her, from you?" "If I take a swab in there, the lab can actually separate the different DNA's." "When the DNA gets sent out and that foreign DNA that was found, matches you, I mean . . . how you gonna explain that?" Quite simply, the officers only spoke hypothetically and did not say they had DNA evidence incriminating defendant. (See *People v. Holloway*, *supra*, 33 Cal.4th at p. 115 [" 'Questioning may include . . . outline of theories of events, confrontation with contradictory facts, even debate between police and suspect . . . .' "]; cf. *People v. Smith* (2007) 40 Cal.4th 483, 505 [in any event, "[p]olice deception 'does not necessarily invalidate an incriminating statement' "].)

Finally, defendant contends the officers psychologically coerced him to confess by stating "[y]ou gotta confess and repent" after learning some 45 minutes earlier that defendant was a church elder. Defendant, citing *People v. Adams* (1983) 143 Cal.App.3d 970, 992, footnote 22, asserts this was an impermissible use of religion as a "tool to extract admissions of guilt." But discussing religion with a suspect is not, in and of itself, an impermissible, coercive technique. (*People v. Kelly* (1990) 51 Cal.3d 931, 951–953 [permissible for officer who learned suspect was Christian to tell suspect his actions

" 'violated your Christian upbringing along with state law and everything else' "].) And it would be absurd if a suspect's purported adherence to religion could negate an otherwise voluntary confession. A request to "confess" or "repent" is nothing but an " ' "exhortation by the police that it would be better for the accused to tell the truth," ' " which the police may do. (*People v. Carrington*, *supra*, 47 Cal.4th at p. 174.)

Here, the conversation leading up to the "repent" comment made no reference to defendant's church. One officer began, saying "Jim you're a man of honesty and integrity so . . . we know you're gonna tell us the truth." Defendant responded "Yeah I try to live a Christian [life]," and the officers then spoke: "That's okay. [¶] And we all make mistakes. [¶] Everybody makes mistakes. And okay, when you get caught what's the first thing you gotta do? [¶] Own up for it. [¶] You gotta confess and repent. . . ." The officers were only encouraging defendant to do the right thing and tell the truth, and were not unduly coercing him. Defendant's interrogation was nothing like the one in *Adams*, a peculiar case in which the "cumulative effect of the sheriff's reliance on his friendship with appellant, his knowledge and use of her religious beliefs" (including their shared knowledge of a particular minister's book), "and his suggestion that appellant might end up in a mental institution if she did not tell the truth rendered appellant's admissions involuntary." (*People v. Adams*, *supra*, 143 Cal.App.3d at pp. 980, 983.) Unlike in *Adams*, "none of the police comments here appear to have been calculated to exploit a particular psychological vulnerability of defendant." (*People v. Kelly*, *supra*, 51 Cal.3d at p. 953.)

After reviewing the record and considering the totality of the circumstances, we agree with the trial court that defendant's confession was not coerced.[6]

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[6] Defendant asks us to consider that the officers knew defendant "was a diabetic with an elevated blood sugar and that he had been awake" for eight hours when the interrogation began. Defendant cites no record evidence suggesting his diabetes or level of exhaustion caused him to act involuntarily. The interview transcript shows defendant

Testimony of Dr. Coleman

During trial, defendant called Dr. Lee Coleman, a medical doctor specializing in adult and child psychiatry. Dr. Coleman had a one-year "pediatric internship" at Children's Medical Center in Seattle between 1964 and 1965. His residency in adult and child psychiatry was at the University of Colorado Medical Center from 1965 to 1969. The trial court accepted Dr. Coleman as an "expert in the areas of psychiatry, child psychiatry, memory, suggestibility and the potential influence of questioning techniques on children." His testimony offered the jury an explanation for why children might misremember alleged instances of sexual abuse.

At one point, defense counsel began to ask Dr. Coleman questions that might qualify him to opine about physical injuries to sexual assault victims. The prosecutor objected to these questions and requested a side bar. This side-bar was not recorded, but evidently the trial court did not permit defense counsel to continue his line of questions.

Defendant raised the issue again near the end of trial. He said he "was going to ask the doctor if there was digital insertion were there physical signs that you could see after the fact." Defendant conceded the prosecution had no notice he would seek to ask such questions of Dr. Coleman, but defendant argued he nonetheless should have the opportunity. The prosecutor reiterated his argument from the earlier side bar that Dr. Coleman lacked the expertise and special training to testify about such injuries. A pediatric internship and experience reviewing—but not conducting, observing, or taking courses related to—Sexual Assault Response Team evaluations, argued the prosecutor, were insufficient to qualify Dr. Coleman. The trial court again foreclosed defendant's proposed line of inquiry, finding the timing of defendant's request suspect and finding Dr. Coleman unqualified to testify.

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was alert, competent, and acting voluntarily. The intake nurse at the jail who evaluated defendant after his confession found he was "alert."

The next day, defendant made one final attempt, highlighting the pediatric internship and telling the trial court he "would be inclined to recall Dr. Coleman to testify briefly about the injuries that one could expect to see, based on the testimony in court at least, of [Jane Doe II]"—that is, that she defendant had digitally penetrated her. The trial court denied defendant's request one final time.

On appeal, defendant contends the trial court should have allowed Dr. Coleman to testify about whether someone who was digitally penetrated, like Jane Doe 2, would typically show any physical injuries. The parties vigorously contest whether Dr. Coleman was qualified to testify as an expert on this topic. First, however, there is a fundamental problem with defendant's appeal. Defendant failed to make a sufficient offer of proof.

"An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal . . . provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) Thus, "[a]n offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176; *McMillian v. Stroud* (2008) 166 Cal.App.4th 692, 704 [offer must " 'indicat[e] the purpose of the testimony, the name of the witness and the content of the answer to be elicited' "].)

In *People v. Foss* (2007) 155 Cal.App.4th 113, 127, the defendant stated he would question the victim to establish the victim's " 'morbid fear of sexual matters' " and that " 'the charges are a creature of that morbid fear.' " The court concluded the "defendant did not give a specific offer of proof of evidence to be produced. His offer was conclusory and concerned only the area of questioning. It did no more than speculate as

to what might be proven, reciting the 'morbid fear' language from [another case]. This speculation and lack of specificity was inadequate to preserve the issue for consideration on appeal." (*Id.* at pp. 127–128.)

Defendant has alluded to the broad area of Dr. Coleman's potential testimony, but has never disclosed what Dr. Coleman would actually have said had he taken the stand. Absent an offer of proof showing what Dr. Coleman "would have testified about . . . we have before us no evidence which could support a finding that [defendant] was harmed by exclusion of [the] testimony; any such finding would necessarily be based on mere speculation." (*People v. Johnson* (1998) 62 Cal.App.4th 608, 636.)

In any event, we would review a trial court's decision whether to admit or exclude expert testimony for an abuse of discretion. (*People v. McWhorter* (2009) 47 Cal.4th 318, 362.) Given the lack of evidence, in this case, of Dr. Cole's experience and understanding of the varieties of physical harm that might result from sexual assault, the trial court could conclude the doctor, a psychiatrist, lacked "expertise beyond that which was shown," and acted rationally by excluding the doctor's testimony on this topic. (*People v. Jones* (2012) 54 Cal.4th 1, 58–59 [noting cases in which experts were not qualified to give opinion on subjects related to but outside their areas of expertise].)

Substantial Evidence on Counts 1 Through 5

Defendant claims if the prosecution put on evidence of molestation, it failed to provide sufficient evidence that he molested Jane Doe 1 on five distinct occasions, supporting the five charges of unlawful touching under section 288, subdivision (a), relating to Jane Doe 1. "Our task in deciding a challenge to the sufficiency of the evidence is a well-established one. '[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 811.)

There was ample evidence to support a guilty verdict on counts 1 through 5. Jane Doe 1 testified defendant touched her more than 20 times, with her clothes off, over a span of 15 months when she went to day care at defendant's house. Each time, defendant touched her "chest," "private part" for "going to the bathroom," and "bottom part" for "sit[ting] on a chair." Jim confessed to fondling Jane Doe 1 "a few times," maybe a number he could "count on one hand"—"[m]aybe a little more, I don't know." *People v. Jones* (1990) 51 Cal.3d 34, the case defendant cites on his behalf, asks what is the "minimum quantum of proof necessary to support a conviction on one or more counts" of molestation "based on . . . generic testimony" (*id.* at p. 314). It answers:

> "The victim, of course, must describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe the general time period in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Id.* at p. 316, italics omitted.)

The evidence against defendant meets this threshold.

CALCRIM No. 330 Jury Instruction

Because Jane Doe 1 was 10 years old when she testified, the court instructed the jury with CALCRIM No. 330, which provides:

> "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony.
> "In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and level of cognitive development.

> "When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate.
> "While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child." (CALCRIM No. 330.)

Defendant contends this instruction violated defendant's "right to jury trial and due process of law in that it invaded the jury's province and unfairly bolstered Jane Doe 1's credibility." He claims the instruction prevented him from impeaching Jane Doe 1's credibility "based on her inability to perceive, understand, remember, and communicate." This argument is baseless. CALCRIM No. 330 explicitly told the jury, when determining whether to believe a young child's testimony, it should in fact "consider the child's ability to perceive, understand, remember, and communicate." The instruction did not bolster Jane Doe 1, but required the jury to more carefully consider how it would treat her testimony in light of her age. There is no error in using CALCRIM No. 330. (See *People v. McCoy* (2005) 133 Cal.App.4th 974, 980 [approving both CALCRIM No. 330 and a predecessor version of the instruction, CALCRIM No. 2.20.1].)

Cruel and Unusual Punishment

Having found no basis to overturn defendant's conviction, we address his arguments regarding punishment.

Defendant first contends his sentence of 120 years to life is cruel and unusual punishment. Section 667.61 mandates punishment of 15 years to life for a lewd or lascivious act under section 228, subdivision (a) when a "defendant has been convicted in the present case . . . of committing [such] offense . . . against more than one victim." (§ 667.61, subds. (b), (c)(8), (e)(4).) Following section 667.61, the trial court imposed a sentence of 15 years to life on each of the 14 counts. The court ran the terms on eight counts consecutively, for an aggregate term of 120 years to life, and ran the terms on the six remaining counts concurrently.

Defendant asserts section 667.61's mandated sentence of 15 years to life per violation is unconstitutional on its face. Defendant acknowledges that facial challenges to section 667.61, called the one strike law, have been rejected (see *People v. Alvarado* (2001) 87 Cal.App.4th 178, 200–201 (*Alvarado*); *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1280–1282 (*Estrada*); *People v. Crooks* (1997) 55 Cal.App.4th 797, 803–808), but argues those cases were wrongly decided. He asserts the mandatory 15-year term is unconstitutional because it does not recognize significant gradations of culpability depending on the severity of the current offense and fails to take into consideration mitigating circumstances.

It is the function of the Legislature to define crimes and proscribe punishment; the judiciary may not interfere in this process unless the statutory penalties are so severe, relative to the crime, as to constitute cruel and unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441, 477–478.) As noted in *Estrada,* punishment under the one strike law is "precisely tailored to fit crimes bearing certain clearly defined characteristics." (*Estrada, supra,* 57 Cal.App.4th at p. 1280.) That section 667.61, subdivision (b) provides for a 15-years-to-life term, while section 667.61, subdivision (a) provides for a 25-years-to-life term, undercuts defendant's assertion that the one strike law does not recognize gradations in culpability depending on the severity of the offense.

Defendant's argument that his sentence under the one strike law exceeds the punishments imposed for the same offenses in all but two other jurisdictions was addressed in *Alvarado.* "[T]hat some other jurisdictions allow for the same or even harsher punishment (Louisiana and Washington) indicates that in the abstract, the One Strike term imposed here is not irrational or obviously excessive punishment . . . ." (*Alvarado, supra,* 87 Cal.App.4th at p. 200; accord, *Estrada, supra,* 57 Cal.App.4th at p. 1282.)

Defendant also argues section 667.61 is unconstitutional as applied to him. Conceding that his offenses were "reprehensible and serious," he argues that his sentence

was far greater than that typically imposed for premeditated murder or on a defendant convicted of continuous sexual molestation of a child under section 288.5. However, the penalty for a single offense cannot properly be compared with the penalty for multiple offenses or multiple offenses against multiple victims. (See *Estrada, supra,* 57 Cal.App.4th at p. 1282.) In addition, section 288.5 merely provides an alternate framework for levying charges of and punishing child molestation. It may be pleaded as an alternative to multiple single acts of molestation, or not pleaded at all. If pleaded as an alternative, the sentence under its provisions prevails only if *greater* than the sentence that would have been imposed in the normal course. (See *People v. Torres* (2002) 102 Cal.App.4th 1053, 1060 [imposing the "greater aggregate sentence with respect to the specific offenses" not the lesser sentence under section 288.5].) The section was not intended to create leniency for child molesters, and does not provide a useful point of comparison for defendant. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 77–78 [allowing punishment under section 288.5 for a course of conduct and additional punishment for single acts beyond those required for the section 288.5 conviction].)

Moreover, the facts of this case support the penalty imposed. Defendant abused his position of trust at a daycare facility and molested two young girls on an ongoing basis. He was convicted of 14 separate acts of molestation. His sentence is not unlike those upheld for defendants convicted of similar crimes. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1222, 1231 [on 16 felony counts, trial court gave 15 years to life on each, some concurrent, for aggregate term of 135 years]; *People v. Snow* (2003) 105 Cal.App.4th 271, 274 [85 years to life for one charge under section 288, subdivision (a), based on additional application of three strikes law]; see also *People v. Wallace* (1993) 14 Cal.App.4th 651, 655, 666–667 [upholding sentence of 283 years eight months for 46 felony offenses arising from sexual assaults on seven victims]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531–532 . . . [upholding sentence of 129 years for 25 offenses against a single victim].)

Accordingly, defendant's sentence is not disproportionate to the offender or the offenses. His claim of cruel and unusual punishment is without merit.

Probation Report Fee

Lastly, defendant challenges imposition of a $176 probation report fee imposed pursuant to section 1203.1b. He claims section 1203.1b entitled him to a hearing before the trial court on his ability to pay the fee before its imposition, and that the trial court denied his request for such a hearing.

Defendant is correct. The statute describes the procedure the trial court must follow before requiring payment of costs associated with probation reports or supervision services. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400–1401 (*Pacheco*).) The court shall first order the defendant to appear before "the probation officer, or his or her authorized representative" so that the officer may ascertain the defendant's ability to pay any part of these costs, and to propose a payment schedule. (§ 1203.1b, subd. (a).) Unless the defendant waives the right, before the court orders payment of these costs the defendant is entitled to a court hearing on his or her ability to pay them. (§ 1203.1b, subds. (a)–(b).) Because the statutory procedure provided by section 1203.1b for the determination of the defendant's ability to pay the ordered probation supervision fee was not followed in *Pacheco* (*Pacheco, supra*, at p. 1401), the appellate court directed the superior court to determine in accordance with the statute the defendant's ability to pay the fee on remand before imposing it. (*Id.* at p. 1404.)

As in *Pacheco*, it appears the statutory procedure "provided in section 1203.1b for a determination of [defendant's] ability to pay probation related costs was not followed." (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.) Therefore, we must vacate the fee and ask the trial court to conduct a hearing to determine defendant's ability to pay.

DISPOSITION

The judgment is affirmed, except we vacate the $176 probation fee. Before such fee may be imposed the trial court must conduct a hearing to determine whether

defendant is able to pay that amount. If the trial court finds defendant does have the ability to pay pursuant to section 1203.1b, it may reinstate the fee. The state may choose, however, to forego the fee in this case to conserve resources.

_____
Banke, J.

We concur:

_____
Margulies, Acting P. J.

_____
Dondero, J.